

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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Cogent Capital Financial LLC and Cogent Capital  
Investments LLC,

Plaintiffs,

- against -

Innofone.com, Incorporated,

Defendant.

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**ECF CASE**

No. 07 Civ. 2701 (JSR)

Innofone.com, Incorporated,

Plaintiff,

- against -

Cogent Capital Financial LLC, Cogent Capital  
Investments LLC, Cogent Capital Group LLC,  
Gregory L. Kofford, Mark W. Holden, and Investors  
Bank & Trust Company,

Defendants.

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**ECF CASE**

No. 07 Civ. 3966 (JSR)

**PLAINTIFF'S STATEMENT OF MATERIAL UNDISPUTED FACTS IN SUPPORT OF  
PLAINTIFF INNOFONE.COM, INCORPORATED'S MOTION  
FOR SUMMARY JUDGMENT**

Jones Day  
555 California Street, 26<sup>th</sup> Floor  
San Francisco, California 94104  
Telephone: 415-626-3939  
Facsimile: 415-875-5700

*Attorneys for Plaintiff  
Innofone.com, Incorporated*

*Of Counsel:*

*Roderick A. McLeod  
Gidon M. Caine  
Jessica L. Repa  
Joanna Rosen*

## INTRODUCTION

Plaintiff Innofone.com Incorporated (“Innofone”) hereby submits the following Statement of Material Undisputed Facts pursuant to Local Civil Rule 56-1 and Fed. R. Civ. P. 56 in Support of its Motion for Summary Judgment in the above-referenced action between plaintiff Innofone and defendants Cogent Capital Financial LLC, Cogent Capital Investments LLC, Cogent Capital Group LLC, Gregory L. Kofford, Mark W. Holden, and Investors Bank & Trust Company.

The following material undisputed facts are grouped according to the individual claims to which the facts relate. Material undisputed facts that relate to more than one claim are re-stated where applicable for clarity. Copies of exhibits cited herein are annexed to the declaration of Alex Lightman, dated May 31, 2007 (“Lightman Decl.”).

## STATEMENT OF MATERIAL UNDISPUTED FACTS

MATERIAL UNDISPUTED FACTS	SUPPORTING EVIDENCE
<b><u>SECOND CLAIM FOR RELIEF</u></b>	
<b>Rescission Based Upon Illegality</b>	
1. On May 5, 2006, Alex Lightman sent Gregory L. Kofford and Mark W. Holden an executed letter in which Innofone and Cogent Capital Group LLC agreed to move forward with a proposed investment of between \$15 and \$50 million and Cogent Capital Group received \$25,000 for due	Lightman Decl. ¶ 8.  May 5 Letter Agreement, attached as Exhibit B to the Lightman Decl.

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diligence fees and \$3,000 for an escrow fee.

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2. By agreement dated as of June 2, 2006, Lightman Decl. ¶¶ 15-18.  
Innofone, Cogent Capital Financial LLC,  
and Cogent Capital Investments LLC, Securities Purchase Agreement, Section 1.1,  
entered into a financing arrangement which attached as Ex. C to Lightman Decl.  
involved the purchase of shares and a  
simultaneous Equity Swap transaction by June 2, 2006 Equity Swap Transaction  
which Cogent Capital Investments bought Confirmation, at 4-5, attached as Ex. G to  
1.85 million shares of Innofone common Lightman Decl.  
stock and 4.815 million shares of  
Innofone's Series A convertible preferred  
stock for \$50 million in U.S. Treasury  
Bonds, and Innofone paid a fee for the  
Equity Swap to Cogent Capital Financial  
comprised of 5 million shares of Innofone  
common stock, a warrant to purchase  
another 5 million shares of common stock,  
and \$1.375 million (hereafter  
"Transaction").

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  3. The following contract documents comprise Lightman Decl. ¶ 20.  
the Transaction documents:
    - i. Securities Purchase Agreement Securities Purchase Agreement, attached as
    - ii. Escrow Agreement Ex. C to Lightman Decl.
    - iii. Master Agreement
    - iv. Schedule to the Master Agreement Escrow Agreement, attached as Ex. D to
    - v. June 2, 2006 Equity Swap Transaction Lightman Decl.
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Confirmation

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| vi. Credit Support Annex                                     | Master Agreement, attached as Ex. E to   |
| vii. Registration Rights Agreement                           | Lightman Decl.   |
| viii. Warrant  |  |
| ix. November 1, 2006 Equity Swap<br>Transaction Confirmation | Schedule to the Master Agreement, attached<br>as Ex. F to Lightman Decl.                     |
| x. November 1, 2006 Interest Rate Swap<br>Transaction        | June 2, 2006 Equity Swap Transaction<br>Confirmation, attached as Ex. G to Lightman<br>Decl. |
|  | Credit Support Annex, attached as Ex. H to<br>Lightman Decl.                                 |
|  | Registration Rights Agreement, attached as<br>Ex. I to Lightman Decl.                        |
|  | Warrant, attached as Ex. J to Lightman Decl.   |
|  | Nov. 1, 2006 Equity Swap Transaction<br>Confirmation, attached as Ex. K to Lightman<br>Decl. |
|  | Nov. 1, 2006 Interest Rate Swap Transaction,<br>attached as Ex. L to Lightman Decl.          |
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| <p>4. Innofone deposited with Investors Bank &amp; Trust Company (the “escrow agent”) the common and preferred shares underlying the Transaction.</p> | <p>Lightman Decl. ¶ 22.</p> <p>Escrow Agreement, ¶1(b), attached as Ex. D to Lightman Decl.</p> |
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|---|---|
| <p>5. Cogent Capital Investments deposited with the escrow agent the \$50 million in U.S. Treasury bonds.</p> | <p>Lightman Decl. ¶ 21.</p> <p>Escrow Agreement, ¶1(a), attached as Ex. D to Lightman Decl.</p> |
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| <p>6. Settlements under the Equity Swap (i.e. the exchange of Innofone stock for the Cogent bonds) could not commence until after a resale registration statement pursuant to Securities and Exchange Commission (“SEC”) Rules and Regulations had become effective for at least 10 million Innofone shares and an effective registration statement maintained for the full amount of the shares.</p> | <p>Lightman Decl. ¶ 17.</p> <p>Warrant, § 3(d), attached as Ex. J to Lightman Decl.</p> <p>Schedule to the Master Agreement, § 8, attached as Ex. F to Lightman Decl.</p> <p>June 13, 2006 Holden email (“The receipt of any additional funds via the equity swap (and also access to the \$50 mm in T-bonds from the private placement) takes place through a defined schedule over 30 months (as Gerard noted, beginning 30 days after a registration of the shares we purchased is effective) which schedule has been designed with timing intended to coordinate with INFN’s</p> |
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cash requirements.”), attached as Ex. N to Lightman Decl.

October 24, 2006 Innofone Response Letter to SEC, at Response 1 (“[S]ettlements under the Equity Swap do not commence until after the resale registration statement becomes effective.”), attached as Ex. W to Lightman Decl.

Nov. 1, 2006 Equity Swap Transaction Confirmation, at 6 (“The ‘Trigger Date’ shall mean the first date as of which the Resale condition has been satisfied with respect to at least 10,000,000 Shares”), attached as Ex. K to Lightman Decl.

April 5, 2007 Cogent Complaint (SDNY), ¶21 (“Among the conditions is a requirement that Innofone maintain an effective registration statement....”), attached as Ex. O to Lightman Decl.

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7. The Equity Swap provided that the exchange of Innofone stock for the bonds would occur over a 30 month period.

June 2, 2006 Equity Swap Transaction Confirmation, at 6-10, 15, attached as Ex. G to Lightman Decl.

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November 1, 2006 Equity Swap Transaction Confirmation, at 2, 11-12, attached as Ex. K to Lightman Decl.

Lightman Decl. ¶ 17.

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8. On July 19, 2006 Innofone filed an SB-2 registration statement with the SEC for the purpose of registering 48,150,000 shares of common stock underlying the Transaction.

July 19, 2006 SB-2 Registration Statement, at 3, attached as Ex. R to Lightman Decl.

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9. Innofone amended its SB-2 three times (on August 28, 2006, October 24, 2006 and

Lightman Decl. ¶¶ 34 - 44.

December 8, 2006) in response to continuing SEC questions about the validity of the Transaction.

Aug. 11, 2006 SEC Letter, attached as Ex. S to Lightman Decl.

Aug. 28, 2006 First-Amended SB-2, attached as Ex. T to Lightman Decl.

Sept. 14, 2006 SEC Letter, attached as Ex. U to Lightman Decl.

Sept. 27, 2006 Innofone Response Letter to SEC, attached as Ex. V to Lightman Decl.

Oct. 24, 2006 Innofone Response Letter to SEC, attached as Ex. W to Lightman Decl.

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Nov. 7, 2006 SEC Letter, attached as Ex. X to Lightman Decl.

Dec. 8, 2006 Innofone Response Letter to SEC, attached as Ex. Y to Lightman Decl.

January 18, 2007 Cogent Response Letter to SEC, attached as Ex. AA to Lightman Decl.

January 24, 2007 SEC Letter, attached as Ex. DD to Lightman Decl.

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10. On December 28, 2006, the SEC advised Innofone that it could not register the resale of the shares of common stock issued to Cogent.

Lightman Decl. ¶ 41.

December 28, 2006 SEC Letter, ¶1 (“Therefore, we do not agree with your conclusion that the private placement is complete in light of the fact that the total consideration you will receive for the private placement will not be determined until the equity swap has been completed. As a result **you may not register the resale of the shares of common stock** issued in the private placement to Cogent until that private placement has been completed. Please revise

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your registration statement accordingly.”)  
(Emphasis added), attached as Ex. Z to  
Lightman Decl.

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11. SEC Regulations prohibit the sale of  
securities to the public without an effective  
registration statement.

15 U.S.C. § 77e and the regulations  
promulgated thereunder.

Rule 415(a)(1)(i), codified at 17 C.F.R.  
230.415(a)(1)(i).

Revision of Rule 144, Rule 145 and Form  
144, Securities Act Release No. 33-7391, at  
35 (Feb. 20, 1997).

15 U.S.C. § 77(x) and the regulations  
promulgated thereunder.

January 18, 2007 Cogent Response Letter to  
SEC, attached as Ex. AA to Lightman Decl.

January 24, 2007 SEC Letter, attached as Ex.  
DD to Lightman Decl.

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12. After the SEC’s most recent rejection on  
March 9, 2007 of Innofone’s proposed SB-  
2 registration, Innofone sought rescission

March 9, 2007 SEC Letter, ¶¶5-9, attached  
as Ex. BB to Lightman Decl.

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without delay.

Innofone Complaint, ¶48, attached as Ex. CC  
to Lightman Decl.

Lightman Decl. ¶¶ 46 - 47.

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**THIRD CLAIM FOR RELIEF**

**Rescission Based Upon Mutual Mistake**

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13. On May 5, 2006, Alex Lightman sent Lightman Decl. ¶ 8.

Gregory L. Kofford and Mark W. Holden

an executed letter in which Innofone and May 5 Letter Agreement, attached as Ex. B to  
Cogent Capital Group LLC agreed to move Lightman Decl.

forward with a proposed investment of

between \$15 and \$50 million and Cogent

Capital Group received \$25,000 for due

diligence fees and \$3,000 for an escrow fee.

**[This fact is identical to UF 1.]**

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14. By agreement dated as of June 2, 2006, Lightman Decl. ¶¶ 15-18.

Innofone, Cogent Capital Financial LLC,

and Cogent Capital Investments LLC, Securities Purchase Agreement, Section 1.1,  
entered into a financing arrangement which attached as Ex. C to Lightman Decl.

involved the purchase of shares and a

simultaneous Equity Swap transaction by June 2, 2006 Equity Swap Transaction

which Cogent Capital Investments bought Confirmation, at 4-5, attached as Ex. G to

1.85 million shares of Innofone common Lightman Decl.

stock and 4.815 million shares of

Innofone's Series A convertible preferred

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stock for \$50 million in U.S. Treasury Bonds, and Innofone paid a fee for the Equity Swap to Cogent Capital Financial comprised of 5 million shares of Innofone common stock, a warrant to purchase another 5 million shares of common stock, and \$1.375 million (hereafter “Transaction”).

**[This fact is identical to UF 2.]**

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15. The following contract documents comprise Lightman Decl. ¶ 20.

the Transaction documents:

- |   |  |
|---|--|
| i. Securities Purchase Agreement                          | Securities Purchase Agreement, attached as   |
| ii. Escrow Agreement                                      | Ex. C to Lightman Decl.  |
| iii. Master Agreement                                     |  |
| iv. Schedule to the Master Agreement                      | Escrow Agreement, attached as Ex. D to   |
| v. June 2, 2006 Equity Swap Transaction Confirmation      | Lightman Decl.   |
| vi. Credit Support Annex                                  | Master Agreement, attached as Ex. E to   |
| vii. Registration Rights Agreement                        | Lightman Decl.   |
| viii. Warrant   |  |
| ix. November 1, 2006 Equity Swap Transaction Confirmation | Schedule to the Master Agreement, attached as Ex. F to Lightman Decl.                  |
| x. November 1, 2006 Interest Rate Swap Transaction        | June 2, 2006 Equity Swap Transaction Confirmation, attached as Ex. G to Lightman Decl. |
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**[This fact is identical to UF 3.]**

Credit Support Annex, attached as Ex. H to Lightman Decl.

Registration Rights Agreement, attached as Ex. I to Lightman Decl.

Warrant, attached as Ex. J to Lightman Decl.

Nov. 1, 2006 Equity Swap Transaction Confirmation, attached as Ex. K to Lightman Decl.

Nov. 1, 2006 Interest Rate Swap Transaction, attached as Ex. L to Lightman Decl.

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16. Innofone, Cogent Capital Financial, LLC and Cogent Capital Investments, LLC entered into the Transaction with the understanding that the shares underlying the Transaction would have an effective resale registration statement.	May 2, 2006 Kofford email (“These indicative prices also assume that the company will be in a position to move from the bulletin board to Amex prior to or concurrent with the effectiveness of the registration of the shares underlying our investment.”), attached as Ex. A to Lightman Decl.
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June 1, 2006 Lightman email (“After closing our highest priorities will be to get the SB-2

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registering your shares approved.”), attached as Ex. M to Lightman Decl.

June 13, 2006 Holden email (“The receipt of any additional funds via the equity swap (and also access to the \$50 mm in T-bonds from the private placement) takes place through a defined schedule over 30 months (as Gerard noted, beginning 30 days after a registration of the shares we purchased is effective) which schedule has been designed with timing intended to coordinate with INFN’s cash requirements.”), attached as Ex. N to Lightman Decl.

Aug. 24, 2006 Kaufman email, attached as Ex. P to Lightman Decl.

Aug. 25, 2006 Kaufman email, attached as Ex. Q to Lightman Decl.

January 18, 2007 Cogent Response Letter to SEC, attached as Ex. AA to Lightman Decl.

April 5, 2007 Cogent Complaint (SDNY), ¶21, attached as Ex. O to the Lightman Decl.

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Lightman Decl. ¶¶ 11, 14, 23 - 28.

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17. Settlements under the Equity Swap (i.e. the exchange of Innofone stock for the Cogent bonds) could not commence until after a resale registration statement pursuant to Securities and Exchange Commission (“SEC”) Rules and Regulations had become effective for at least 10 million Innofone shares and an effective registration statement maintained for the full amount of the shares.

**[This fact is identical to UF 6.]**

Lightman Decl. ¶ 17.

Warrant, § 3(d), attached as Ex. J to Lightman Decl.

Schedule to the Master Agreement, § 8, attached as Ex. F to Lightman Decl.

June 13, 2006 Holden email (“The receipt of any additional funds via the equity swap (and also access to the \$50 mm in T-bonds from the private placement) takes place through a defined schedule over 30 months (as Gerard noted, beginning 30 days after a registration of the shares we purchased is effective) which schedule has been designed with timing intended to coordinate with INFN’s cash requirements.”), attached as Ex. N to Lightman Decl.

October 24, 2006 Innofone Response Letter to SEC, at Response 1 (“[S]ettlements under the Equity Swap do not commence until after the resale registration statement becomes

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effective.”), attached as Ex. W to Lightman Decl.

Nov. 1, 2006 Equity Swap Transaction Confirmation, at 6 (“The ‘Trigger Date’ shall mean the first date as of which the Resale condition has been satisfied with respect to at least 10,000,000 Shares”), attached as Ex. K to Lightman Decl.

April 5, 2007 Cogent Complaint (SDNY), ¶21 (“Among the conditions is a requirement that Innofone maintain an effective registration statement....”), attached as Ex. O to Lightman Decl.

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18. Effective registration of the underlying shares is a condition of the Transaction.

Lightman Decl. ¶¶ 24 - 28.

June 13, 2006 Holden email (“The receipt of any additional funds via the equity swap (and also access to the \$50 mm in T-bonds from the private placement) takes place through a defined schedule over 30 months (as Gerard noted, beginning 30 days after a registration of the shares we purchased is effective) which schedule has been designed with timing intended to coordinate with INFN’s

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cash requirements.”), attached as Ex. N to Lightman Decl.

April 5, 2007 Cogent Complaint (SDNY), ¶21 (“Among the conditions is a requirement that Innofone maintain an effective registration statement....”), attached as Ex. O to Lightman Decl.

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19. Innofone, Cogent Capital Financial LLC and Cogent Capital Investments LLC believed that the SEC would approve Innofone common stock sold to Cogent Capital Financial LLC and Cogent Capital Investments LLC pursuant to the Transaction.	May 2, 2006 Kofford email (“[O]ur typical investment provides for a partial valuation of the equity swap and release of collateral as soon as 90 days from effectiveness of registration.”), attached as Ex. A to Lightman Decl.
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Lightman Decl. ¶ 11, 14, 23 - 28.

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20. The parties were mistaken that the SEC would approve registration of the shares.	Lightman Decl. ¶ 48.
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Aug. 11, 2006 SEC Letter, attached as Ex. S to Lightman Decl.

Aug. 28, 2006 First-Amended SB-2, attached as Ex. T to Lightman Decl.

Sept. 14, 2006 SEC Letter, attached as Ex. U to Lightman Decl.

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Sept. 27, 2006 Innofone Response Letter to SEC, attached as Ex. V to Lightman Decl.

Oct. 24, 2006 Innofone Response Letter to SEC, attached as Ex. W to Lightman Decl.

Nov. 7, 2006 SEC Letter, attached as Ex. X to Lightman Decl.

Dec. 8, 2006 Innofone Response Letter to SEC, attached as Ex. Y to Lightman Decl.

January 18, 2007 Cogent Response Letter to SEC, attached as Ex. AA to Lightman Decl.

January 24, 2007 SEC Letter, attached as Ex. DD to Lightman Decl.

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21. On December 28, 2006, the SEC advised Innofone that it could not register the resale of the shares of common stock issued to Cogent. **[This fact is identical to UF 10.]**

Lightman Decl. ¶ 41.

December 28, 2006 SEC Letter, ¶1 (“Therefore, we do not agree with your conclusion that the private placement is complete in light of the fact that the total consideration you will receive for the private

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placement will not be determined until the equity swap has been completed. As a result **you may not register the resale of the shares of common stock** issued in the private placement to Cogent until that private placement has been completed. Please revise your registration statement accordingly.”) (Emphasis added), attached as Ex. Z to Lightman Decl.

22. Innofone has not received any benefit from the Transaction. Lightman Decl. ¶ 49.

23. The Transaction continues to be a detriment to Innofone since Innofone is required to pay monthly interest on the bonds. Lightman Decl. ¶ 50.

24. After the SEC’s most recent rejection on March 9, 2007 of Innofone’s proposed SB-2 registration, Innofone sought rescission without delay. March 9, 2007 SEC Letter, ¶¶5-9, attached as Ex. BB to Lightman Decl. [This fact is identical to UF 12.] Innofone Complaint, ¶48, attached as Ex. CC to Lightman Decl.

Lightman Decl. ¶¶ 46 - 47.

### **FIFTH CLAIM FOR RELIEF**

#### **Declaratory Relief Based Upon Impossibility**

25. On May 5, 2006, Alex Lightman sent Gregory L. Kofford and Mark W. Holden an executed letter in which Innofone and Lightman Decl. ¶ 8. May 5 Letter Agreement, attached as Ex. B to

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Cogent Capital Group LLC agreed to move forward with a proposed investment of between \$15 and \$50 million and Cogent Capital Group received \$25,000 for due diligence fees and \$3,000 for an escrow fee.

**[This fact is identical to UF 1.]**

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26. By agreement dated as of June 2, 2006, Innofone, Cogent Capital Financial LLC, and Cogent Capital Investments LLC, entered into a financing arrangement which involved the purchase of shares and a simultaneous Equity Swap transaction by which Cogent Capital Investments bought 1.85 million shares of Innofone common stock and 4.815 million shares of Innofone's Series A convertible preferred stock for \$50 million in U.S. Treasury Bonds, and Innofone paid a fee for the Equity Swap to Cogent Capital Financial comprised of 5 million shares of Innofone common stock, a warrant to purchase another 5 million shares of common stock, and \$1.375 million (hereafter "Transaction").

**[This fact is identical to UF 2.]**

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27. The following contract documents comprise

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Lightman Decl.

Lightman Decl. ¶¶ 15-18.

Securities Purchase Agreement, Section 1.1, attached as Ex. C to Lightman Decl.

June 2, 2006 Equity Swap Transaction Confirmation, at 4-5, attached as Ex. G to Lightman Decl.

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the Transaction documents:

i. Securities Purchase Agreement	Securities Purchase Agreement, attached as
ii. Escrow Agreement	Ex. C to Lightman Decl.
iii. Master Agreement	
iv. Schedule to the Master Agreement	Escrow Agreement, attached as Ex. D to
v. June 2, 2006 Equity Swap Transaction Confirmation	Lightman Decl.
vi. Credit Support Annex	Master Agreement, attached as Ex. E to
vii. Registration Rights Agreement	Lightman Decl.
viii. Warrant	
ix. November 1, 2006 Equity Swap Transaction Confirmation	Schedule to the Master Agreement, attached as Ex. F to Lightman Decl.
x. November 1, 2006 Interest Rate Swap Transaction	June 2, 2006 Equity Swap Transaction Confirmation, attached as Ex. G to Lightman Decl.
<b>[This fact is identical to UF 3.]</b>	
	Credit Support Annex, attached as Ex. H to Lightman Decl.
	Registration Rights Agreement, attached as Ex. I to Lightman Decl.
	Warrant, attached as Ex. J to Lightman Decl.
	Nov. 1, 2006 Equity Swap Transaction

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	Confirmation, attached as Ex. K to Lightman Decl.
	Nov. 1, 2006 Interest Rate Swap Transaction, attached as Ex. L to Lightman Decl.
28. Innofone deposited with Investors Bank & Trust Company (the “escrow agent”) the common and preferred shares underlying the Transaction.	Lightman Decl. ¶ 22.  Escrow Agreement, ¶1(b), attached as Ex. D to Lightman Decl.
<b>[This fact is identical to UF 4.]</b>	
29. Cogent Capital Investments deposited with the escrow agent the \$50 million in U.S. Treasury bonds.	Lightman Decl. ¶ 21.  Escrow Agreement, ¶1(a), attached as Ex. D to Lightman Decl.
<b>[This fact is identical to UF 5.]</b>	
30. Settlements under the Equity Swap (i.e. the exchange of Innofone stock for the Cogent bonds) could not commence until after a resale registration statement pursuant to Securities and Exchange Commission (“SEC”) Rules and Regulations had become effective for at least 10 million Innofone shares and an effective registration statement maintained for the full amount of the shares.	Lightman Decl. ¶17.  Warrant, § 3(d), attached as Ex. J to Lightman Decl.  Schedule to the Master Agreement, § 8, attached as Ex. F to Lightman Decl.  June 13, 2006 Holden email (“The receipt of any additional funds via the equity swap (and also access to the \$50 mm in T-bonds from the private placement) takes place through a
<b>[This fact is identical to UF 6.]</b>	

defined schedule over 30 months (as Gerard noted, beginning 30 days after a registration of the shares we purchased is effective) which schedule has been designed with timing intended to coordinate with INFN's cash requirements."), attached as Ex. N to Lightman Decl.

October 24, 2006 Innofone Response Letter to SEC, at Response 1 ("[S]ettlements under the Equity Swap do not commence until after the resale registration statement becomes effective."), attached as Ex. W to Lightman Decl.

Nov. 1, 2006 Equity Swap Transaction Confirmation, at 6 ("The 'Trigger Date' shall mean the first date as of which the Resale condition has been satisfied with respect to at least 10,000,000 Shares"), attached as Ex. K to Lightman Decl.

April 5, 2007 Cogent Complaint (SDNY), ¶21 ("Among the conditions is a requirement that Innofone maintain an effective registration statement...."), attached as Ex. O

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	to Lightman Decl.
31. The Equity Swap provided that the exchange of Innofone stock for the bonds would occur over a 30 month period. <b>[This fact is identical to UF 7.]</b>	June 2, 2006 Equity Swap Transaction Confirmation, at 6-10, 15, attached as Ex. G to Lightman Decl.  November 1, 2006 Equity Swap Transaction Confirmation, at 2, 11-12, attached as Ex. K to Lightman Decl.
	Lightman Decl. ¶ 17.
32. On July 19, 2006 Innofone filed an SB-2 registration statement with the SEC for the purpose of registering 48,150,000 shares of common stock underlying the Transaction. <b>[This fact is identical to UF 8.]</b>	July 19, 2006 SB-2 Registration Statement, at 3, attached as Ex. R to Lightman Decl.
33. Innofone amended its SB-2 three times (on August 28, 2006, October 24, 2006 and December 8, 2006) in response to continuing SEC questions about the validity of the Transaction. <b>[This fact is identical to UF 9.]</b>	Lightman Decl. ¶¶ 34 - 44.  Aug. 11, 2006 SEC Letter, attached as Ex. S to Lightman Decl.  Aug. 28, 2006 First-Amended SB-2, attached as Ex. T to Lightman Decl.  Sept. 14, 2006 SEC Letter, attached as Ex. U to Lightman Decl.

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Sept. 27, 2006 Innofone Response Letter to SEC, attached as Ex. V to Lightman Decl.

Oct. 24, 2006 Innofone Response Letter to SEC, attached as Ex. W to Lightman Decl.

Nov. 7, 2006 SEC Letter, attached as Ex. X to Lightman Decl.

Dec. 8, 2006 Innofone Response Letter to SEC, attached as Ex. Y to Lightman Decl.

January 18, 2007 Cogent Response Letter to SEC, attached as Ex. AA to Lightman Decl.

January 24, 2007 SEC Letter, attached as Ex. DD to Lightman Decl.

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34. Effective registration of the underlying shares is a condition of the Transaction.

**[This fact is identical to UF 18.]**

Lightman Decl. ¶¶ 24 - 28.

June 13, 2006 Holden email (“The receipt of any additional funds via the equity swap (and also access to the \$50 mm in T-bonds from the private placement) takes place through a defined schedule over 30 months (as Gerard noted, beginning 30 days after a registration

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of the shares we purchased is effective)  
which schedule has been designed with  
timing intended to coordinate with INFN's  
cash requirements."), attached as Ex. N to  
Lightman Decl.

April 5, 2007 Cogent Complaint (SDNY),  
¶21 ("Among the conditions is a requirement  
that Innofone maintain an effective  
registration statement...."), attached as Ex. O  
to Lightman Decl.

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35. SEC Regulations prohibit the sale of  
securities to the public without an effective  
registration statement.

**[This fact is identical to UF 11.]**

15 U.S.C. § 77e and the regulations  
promulgated thereunder.

Rule 415(a)(1)(i), codified at 17 C.F.R.  
230.415(a)(1)(i).

Revision of Rule 144, Rule 145 and Form  
144, Securities Act Release No. 33-7391, at  
35 (Feb. 20, 1997).

15 U.S.C. § 77(x) and the regulations  
promulgated thereunder.

January 18, 2007 Cogent Response Letter to  
SEC, attached as Ex. AA to Lightman Decl.

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January 24, 2007 SEC Letter, attached as Ex.  
DD to Lightman Decl.

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36. The SEC refused to approve the registration of each of the four separate occasions Innofone sought approval. Lightman Decl. ¶¶ 29, 33, 34, 36, 39, 41, 44 - 46.

Aug. 11, 2006 SEC Letter, attached as Ex. S  
to Lightman Decl.

Sept. 14, 2006 SEC Letter, attached as Ex. U  
to Lightman Decl.

Nov. 7, 2006 SEC Letter, attached as Ex. X  
to Lightman Decl.

December 28, 2006 SEC Letter, attached as  
Ex. Z to Lightman Decl.

January 24, 2007 SEC Letter, attached as Ex.  
DD to Lightman Decl.

March 9, 2007 SEC Letter, attached as Ex.  
BB to Lightman Decl.

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- 
37. On December 28, 2006, the SEC advised Innofone that it could not register the resale of the shares of common stock issued to Cogent.  
**[This fact is identical to UF 10.]**
- Lightman Decl. ¶ 41.  
December 28, 2006 SEC Letter, ¶1 (“Therefore, we do not agree with your conclusion that the private placement is complete in light of the fact that the total consideration you will receive for the private placement will not be determined until the equity swap has been completed. As a result **you may not register the resale of the shares of common stock** issued in the private placement to Cogent until that private placement has been completed. Please revise your registration statement accordingly.”) (Emphasis added), attached as Ex. Z to Lightman Decl.
- 
38. After the SEC’s most recent rejection on March 9, 2007 of Innofone’s proposed SB-2 registration, Innofone sought rescission without delay.  
**[This fact is identical to UF 12.]**
- March 9, 2007 SEC Letter, ¶¶5-9, attached as Ex. BB to Lightman Decl.  
Innofone Complaint, ¶48, attached as Ex. CC to Lightman Decl.  
Lightman Decl. ¶¶ 46 - 47.
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**FIFTH CLAIM FOR RELIEF**

**Declaratory Relief Based Upon Failure of Consideration.**

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39. On May 5, 2006, Alex Lightman sent Lightman Decl. ¶ 8.  
Gregory L. Kofford and Mark W. Holden  
an executed letter in which Innofone and May 5 Letter Agreement, attached as Ex. B to  
Cogent Capital Group LLC agreed to move Lightman Decl.  
forward with a proposed investment of  
between \$15 and \$50 million and Cogent  
Capital Group received \$25,000 for due  
diligence fees and \$3,000 for an escrow fee.

**[This fact is identical to UF 1.]**

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40. By agreement dated as of June 2, 2006, Lightman Decl. ¶¶ 15-18.  
Innofone, Cogent Capital Financial LLC,  
and Cogent Capital Investments LLC, Securities Purchase Agreement, Section 1.1,  
entered into a financing arrangement which attached as Ex. C to Lightman Decl.  
involved the purchase of shares and a  
simultaneous Equity Swap transaction by June 2, 2006 Equity Swap Transaction  
which Cogent Capital Investments bought Confirmation, at 4-5, attached as Ex. G to  
1.85 million shares of Innofone common Lightman Decl.  
stock and 4.815 million shares of  
Innofone's Series A convertible preferred  
stock for \$50 million in U.S. Treasury  
Bonds, and Innofone paid a fee for the  
Equity Swap to Cogent Capital Financial  
comprised of 5 million shares of Innofone  
common stock, a warrant to purchase

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another 5 million shares of common stock,  
and \$1.375 million (hereafter  
“Transaction”).

**[This fact is identical to UF 2.]**

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41. The following contract documents comprise Lightman Decl. ¶ 20.

the Transaction documents:

- |   |   |
|---|---|
| i. Securities Purchase Agreement                          | Securities Purchase Agreement, attached as                            |
| ii. Escrow Agreement                                      | Ex. C to Lightman Decl.   |
| iii. Master Agreement                                     |   |
| iv. Schedule to the Master Agreement                      | Escrow Agreement, attached as Ex. D to                                |
| v. June 2, 2006 Equity Swap Transaction Confirmation      | Lightman Decl.  |
| vi. Credit Support Annex                                  | Master Agreement, attached as Ex. E to                                |
| vii. Registration Rights Agreement                        | Lightman Decl.  |
| viii. Warrant   |   |
| ix. November 1, 2006 Equity Swap Transaction Confirmation | Schedule to the Master Agreement, attached as Ex. F to Lightman Decl. |
| x. November 1, 2006 Interest Rate Swap Transaction        | June 2, 2006 Equity Swap Transaction                                  |

**[This fact is identical to UF 3.]**

Confirmation, attached as Ex. G to Lightman Decl.

Credit Support Annex, attached as Ex. H to Lightman Decl.

Registration Rights Agreement, attached as

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Ex. I to Lightman Decl.

Warrant, attached as Ex. J to Lightman Decl.

Nov. 1, 2006 Equity Swap Transaction  
Confirmation, attached as Ex. K to Lightman  
Decl.

Nov. 1, 2006 Interest Rate Swap Transaction,  
attached as Ex. L to Lightman Decl.

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<p>42. Innofone deposited with Investors Bank &amp; Trust Company (the “escrow agent”) the common and preferred shares underlying the Transaction.</p>	<p>Lightman Decl. ¶ 22.</p> <p>Escrow Agreement, ¶1(b), attached as Ex. D to Lightman Decl.</p>
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**[This fact is identical to UF 4.]**

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<p>43. Cogent Capital Investments deposited with the escrow agent the \$50 million in U.S. Treasury bonds.</p>	<p>Lightman Decl. ¶ 21.</p> <p>Escrow Agreement, ¶1(a), attached as Ex. D to Lightman Decl.</p>
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**[This fact is identical to UF 5.]**

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<p>44. Settlements under the Equity Swap (i.e. the exchange of Innofone stock for the Cogent bonds) could not commence until after a resale registration statement pursuant to Securities and Exchange Commission (“SEC”) Rules and Regulations had become effective for at least 10 million Innofone</p>	<p>Lightman Decl. ¶17.</p> <p>Warrant, § 3(d), attached as Ex. J to Lightman Decl.</p> <p>Schedule to the Master Agreement, § 8, attached as Ex. F to Lightman Decl.</p>
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shares and an effective registration

statement maintained for the full amount of  
the shares.

**[This fact is identical to UF 6.]**

June 13, 2006 Holden email (“The receipt of any additional funds via the equity swap (and also access to the \$50 mm in T-bonds from the private placement) takes place through a defined schedule over 30 months (as Gerard noted, beginning 30 days after a registration of the shares we purchased is effective) which schedule has been designed with timing intended to coordinate with INFN’s cash requirements.”), attached as Ex. N to Lightman Decl.

October 24, 2006 Innofone Response Letter to SEC, at Response 1 (“[S]ettlements under the Equity Swap do not commence until after the resale registration statement becomes effective.”), attached as Ex. W to Lightman Decl.

Nov. 1, 2006 Equity Swap Transaction Confirmation, at 6 (“The ‘Trigger Date’ shall mean the first date as of which the Resale condition has been satisfied with respect to at least 10,000,000 Shares”), attached as Ex. K to Lightman Decl.

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April 5, 2007 Cogent Complaint (SDNY),  
¶21 (“Among the conditions is a requirement  
that Innofone maintain an effective  
registration statement....”), attached as Ex. O  
to Lightman Decl.

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45. The Equity Swap provided that the  
exchange of Innofone stock for the bonds  
would occur over a 30 month period.

**[This fact is identical to UF 7.]**

June 2, 2006 Equity Swap Transaction  
Confirmation, at 6-10, 15, attached as Ex. G  
to Lightman Decl.

November 1, 2006 Equity Swap Transaction  
Confirmation, at 2, 11-12, attached as Ex. K  
to Lightman Decl.

Lightman Decl. ¶ 17.

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46. Effective registration of the underlying  
shares is a condition of the Transaction.

**[This fact is identical to UF 18.]**

June 13, 2006 Holden email (“The receipt of  
any additional funds via the equity swap (and  
also access to the \$50 mm in T-bonds from  
the private placement) takes place through a  
defined schedule over 30 months (as Gerard  
noted, beginning 30 days after a registration  
of the shares we purchased is effective)  
which schedule has been designed with  
timing intended to coordinate with INFN’s

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cash requirements.”), attached as Ex. N to Lightman Decl.

April 5, 2007 Cogent Complaint (SDNY), ¶21 (“Among the conditions is a requirement that Innofone maintain an effective registration statement....”), attached as Ex. O to Lightman Decl.

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47. SEC Regulations prohibit the sale of securities to the public without an effective registration statement.

**[This fact is identical to UF 11.]**

15 U.S.C. § 77e and the regulations promulgated thereunder.

Rule 415(a)(1)(i), codified at 17 C.F.R. 230.415(a)(1)(i).

Revision of Rule 144, Rule 145 and Form 144, Securities Act Release No. 33-7391, at 35 (Feb. 20, 1997).

15 U.S.C. § 77(x) and the regulations promulgated thereunder.

January 18, 2007 Cogent Response Letter to SEC, attached as Ex. AA to Lightman Decl.

January 24, 2007 SEC Letter, attached as Ex. DD to Lightman Decl.

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48. On July 19, 2006 Innofone filed an SB-2 July 19, 2006 SB-2 Registration Statement, at registration statement with the SEC for the 3, attached as Ex. R to Lightman Decl. purpose of registering 48,150,000 shares of common stock underlying the Transaction.

**[This fact is identical to UF 8.]**

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49. Innofone amended its SB-2 three times (on Lightman Decl. ¶¶ 34 - 44. August 28, 2006, October 24, 2006 and December 8, 2006) in response to Aug. 11, 2006 SEC Letter, attached as Ex. S continuing SEC questions about the validity to Lightman Decl. of the Transaction.

**[This fact is identical to UF 9.]**

Aug. 28, 2006 First-Amended SB-2, attached as Ex. T to Lightman Decl.

Sept. 14, 2006 SEC Letter, attached as Ex. U to Lightman Decl.

Sept. 27, 2006 Innofone Response Letter to SEC, attached as Ex. V to Lightman Decl.

Oct. 24, 2006 Innofone Response Letter to SEC, attached as Ex. W to Lightman Decl.

Nov. 7, 2006 SEC Letter, attached as Ex. X to Lightman Decl.

Dec. 8, 2006 Innofone Response Letter to

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SEC, attached as Ex. Y to Lightman Decl.

January 18, 2007 Cogent Response Letter to  
SEC, attached as Ex. AA to Lightman Decl.

January 24, 2007 SEC Letter, attached as Ex.  
DD to Lightman Decl.

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50. On December 28, 2006, the SEC advised  
Innofone that it could not register the resale  
of the shares of common stock issued to  
Cogent. **[This fact is identical to UF 10.]**

Lightman Decl. ¶ 41.

December 28, 2006 SEC Letter, ¶1  
("Therefore, we do not agree with your  
conclusion that the private placement is  
complete in light of the fact that the total  
consideration you will receive for the private  
placement will not be determined until the  
equity swap has been completed. As a result  
**you may not register the resale of the  
shares of common stock** issued in the  
private placement to Cogent until that private  
placement has been completed. Please revise  
your registration statement accordingly.")  
(Emphasis added), attached as Ex. Z to  
Lightman Decl.

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51. Innofone is unable to access the U.S. Lightman Decl. ¶¶ 49 - 50.

Treasury Bonds because the SEC refuses to approve the registration of the Innofone common stock that was issued pursuant to the Transaction.

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52. Innofone has not received any benefit from Lightman Decl. ¶ 49.

the Transaction.

**[This fact is identical to UF 22.]**

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53. The Transaction continues to be a detriment Lightman Decl. ¶ 50.

to Innofone since Innofone is required to pay monthly interest on the bonds.

**[This fact is identical to UF 23.]**

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54. After the SEC's most recent rejection on March 9, 2007 SEC Letter, ¶¶5-9, attached as March 9, 2007 of Innofone's proposed SB- Ex. BB to Lightman Decl.

2 registration, Innofone sought rescission without delay.

Innofone Complaint, ¶48, attached as Ex. CC to Lightman Decl.

**[This fact is identical to UF 12.]**

Lightman Decl. ¶¶ 46 - 47.

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Dated: San Francisco, California  
June 4, 2007

Of Counsel:

Gidon M. Caine (GC 9923)  
JONES DAY  
1755 Embarcadero Road  
Palo Alto, California 94303  
Telephone: (650) 739-3939  
Facsimile: (650) 739-3900

Jessica L. Repa  
Joanna Rosen  
JONES DAY  
555 California Avenue  
Suite 2600  
San Francisco, California 94104  
Telephone: (415) 626-3939  
Facsimile: (415) 875-5700

JONES DAY

By: /s/  
Roderick A. McLeod (RM 4936)

JONES DAY  
555 California Avenue  
Suite 2600  
San Francisco, California 94104  
Telephone: (415) 626-3939  
Facsimile: (415) 875-5700

Attorneys for Plaintiff  
Innofone.com, Incorporated

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